(5)

No. 85-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Petitioner,

v.

JOHN DOES, I, II, III, IV, V and
JOHN DOES, INC. I, II, and III,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE ARCHER-DANIELS-MIDLAND COMPANY AND NABISCO BRANDS, INC., IN SUPPORT OF RESPONDENTS

DAVID A. DONOHOE
OWEN M. JOHNSON, JR.
PAUL B. HEWITT
Akin, Gump, Strauss,
Hauer & Feld
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Attorneys for Petitioner Archer-Daniels-Midland Company

J. RANDOLPH WILSON*
WILLIAM H. ALLEN
CAROL FORTINE
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioner Nabisco Brands, Inc.

* *Counsel of Record*

August 28, 1986

32/1

TABLE OF CONTENTS

Table of Authorities

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1613

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN DOES I, II, III, IV, V and
JOHN DOES, INC. I, II, and III,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE ARCHER-DANIELS-MIDLAND COMPANY AND NABISCO BRANDS, INC., IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE[1]

Amici Archer-Daniels-Midland Company ("ADM") and Nabisco Brands, Inc. ("Nabisco") are parties to *United States* v. *Archer-Daniels-Midland Co. and Nabisco Brands, Inc.*, 785 F.2d 206 (8th Cir. 1986), a

---

[1] Petitioner and respondent have given their written consent to the filing of this brief.

case presenting issues of grand jury secrecy related to those in this case and as to which a petition for writ of certiorari, No. 85-1840, is pending in this Court.

The amici's case arose out of a federal grand jury investigation into alleged price-fixing in the corn wet milling industry, of which ADM and Nabisco are members. The grand jury was dissolved without the issuance of any indictments. Thereafter, the Antitrust Division of the Justice Department investigated the leasing by ADM of two corn wet milling plants from Nabisco, which resulted in the filing of a civil lawsuit against ADM and Nabisco alleging violations of federal antitrust laws. Relevant to the antitrust validity of the ADM/Nabisco lease are the alleged price collusion, as well as other subjects apparently covered by the grand jury investigation of the corn wet milling industry. ADM and Nabisco moved for dismissal without prejudice of the civil action challenging the lease, on the ground that the Government had violated Fed. R. Crim. P. 6(e) by assigning to the civil case, without obtaining a court order, several lawyers and non-lawyers who had extensive knowledge of and continuing access to materials gathered in the course of the grand jury investigation, in which they participated. The district court denied the motion and the Eighth Circuit affirmed. *United States* v. *Archer-Daniels-Midland Co. and Nabisco Brands, Inc.*, 785 F.2d 206 (8th Cir. 1986).

The amici as petitioners for review of the Eighth Circuit's decision in that case have presented in No. 85-1840 questions identical or closely related to the first question presented in this case.

STATEMENT OF THE CASE

In *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), this Court held that, under Fed. R. Crim. P. 6(e), attorneys in the Civil Division of the Justice Department who have not taken part in a grand jury investigation may not have automatic access to grand jury materials for use in a subsequent civil investigation, but can obtain access only pursuant to a court order upon a showing of particularized need. The Court reasoned, *inter alia*, that automatic access to grand jury materials was limited under Rule 6(e)(3)(A)(i) to those attorneys who conducted the criminal proceeding for use in their prosecutorial function, 463 U.S. at 428-431; that subsection (3)(A)(ii) of the Rule reflected Congress's intent to prohibit the use of grand jury materials in civil proceedings in the absence of a court order, *id.* at 435-42; and that allowing automatic access to nonprosecutors for civil use would undermine the policies underlying Rule 6(e) by increasing the risk of inadvertent or illegal disclosure, threatening the willingness of grand jury witnesses to testify fully and candidly, and tempting prosecutors to misuse the grand jury for civil investigative ends, *id.* at 432-35.

The *Sells* Court, however, did not consider "any issue concerning continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." 463 U.S. at 431 n.15. This case presents the issue thus reserved in *Sells*. It grows out of a grand jury investigation initiated by the Antitrust Division of the Justice Department into alleged bid-rigging and price fixing by American companies in sales of tallow to a foreign government. The grand jury heard testimony

from dozens of witnesses and collected approximately 250,000 documents pursuant to subpoena.

After the grand jury was dissolved without returning indictments, the same attorneys who had conducted the criminal investigation began a civil investigation. They sought and obtained an order under Rule 6(e)(3)(C)(i) permitting disclosure of grand jury evidence to attorneys in the Civil Division of the Justice Department and in the Office of the United States Attorney for the Southern District of New York so that those attorneys could advise whether a civil suit was appropriate under the False Claims Act. The Civil Division advised the Antitrust Division that such a suit would be appropriate; the Antitrust Division then notified respondents that it would file a civil complaint against them under both the Sherman Act and the False Claims Act. Respondents thereupon moved in the district court to vacate the Rule 6(e) order and for a protective order prohibiting continued use of the grand jury materials in the preparation and litigation of the civil suit. The district court denied the requested relief.

On appeal, the Second Circuit vacated the disclosure order upon finding that the Government had not made the requisite showing of particularized need and reversed the district court's denial of respondents' motion to enjoin the Antitrust Division lawyers from any further access to or use of the grand jury materials in the civil action. *In re Grand Jury Investigation*, 774 F.2d 34, 43 (2d Cir. 1985) (Pet. App. 1a-18a.)[2]

[2] This brief addresses only the issue whether the court below was correct in holding that the continued use of or access to grand jury materials in the civil phase of a case by government attorneys who took part in the criminal investigation is prohibited in the absence of a court order. It does not address the issue whether the Second Circuit appropriately vacated the order authorizing disclosure to attorneys who had not participated in the criminal case.

SUMMARY OF ARGUMENT

The central theme of the Government's argument is that the delay and expense incident to recreating grand jury materials through civil process justifies a rule allowing prosecutors to have automatic continued access to grand jury materials for use in civil proceedings. This argument exaggerates the burden on the Government and assumes, erroneously, that the claimed burden is alone sufficient to show a particularized need for disclosure. The Government's supplemental argument that this case presents the question whether government prosecutors should always be disqualified from participation in subsequent civil suits is similarly misdirected. Although it is true that a prosecutor's use in a civil case of unrefreshed recollection of grand jury materials should be treated the same as the use of refreshed recollection of such materials, neither use is absolutely prohibited, but may be permitted pursuant to a (C)(i) court order. At bottom, the Government's position on undue burden or disqualification raises issues more appropriately addressed in a hearing for a disclosure order under Rule 6(e)(3)(C)(i).

The Second Circuit's holding comports with the plain language of Rule 6(e), its legislative history, and the policies underlying the rule of grand jury secrecy.

First, the Second Circuit's holding that allowing government lawyers who had conducted a criminal

investigation continued access to grand jury materials for use in preparing and litigating a civil case was "tantamount to" disclosure is clearly in accord with the plain meaning of the Rule. The term "disclose" means to "make known" or "reveal" something formerly held secret. When a government lawyer is given ar opportunity to use grand jury secrets in drafting civil pleadings, formulating interrogatories and questioning witnesses, there is a disclosure of those secrets within the meaning of the Rule. The Government's contention that one can disclose matters occurring before the grand jury only by physically transferring grand jury documents to someone who has no right to see them does violence to the plain meaning of the Rule as interpreted by this Court and others. The Government's related contention that it is possible for lawyers to make use of grand jury materials in a civil case without revealing their contents to others ignores the realities of case preparation and litigation. Finally, petitioner's argument that government lawyers who worked on the criminal investigation have a "right" to use grand jury materials in subsequent civil litigation by virtue of their initial lawful access to those materials is contrary to this Court's holding in *Sells* that government lawyers are entitled to automatic access to grand jury materials only because of their need to use such materials in performing their duties to enforce federal criminal law.

Second, the legislative history of Rule 6(e) supports the holding of the court below. The history of the Rule and its amendments clearly indicates that Congress contemplated disclosure of grand jury materials to government lawyers only insofar as access was

needed to enable those lawyers to carry out their criminal law enforcement duties. Once the criminal investigation is concluded, the need for such materials to aid the lawyer in his prosecutorial duties evaporates, thereby extinguishing the lawyer's right of access. Moreover, continued use for civil investigative purposes runs counter to clear legislative history indicating Congress's intent to prevent any use of grand jury material in civil cases without the protections afforded by judicial authorization. Congress did not distinguish in this regard between use by lawyers who had participated in the criminal investigation and use by those who had not, and no basis exists for such a distinction.

Indeed, the Government does not point to any affirmative legislative history supporting its claim of the right of prosecutors to continued use. Rather, it relies on an asserted "longstanding" practice of the Justice Department allowing continued use of grand jury materials in civil cases, coupled with the absence of any explicit legislative history indicating disapproval of this alleged "longstanding" practice. Since nowhere in the legislative history does Congress evince any awareness of the Justice Department's asserted practice, however, its failure to expressly disapprove such practice is without import. Moreover, this Court in *Sells* expressly rejected both the claim that the Department has a standard practice of allowing such continued use and the claim that this Court had approved such a practice.

Fourth, the policies underlying the rule of grand jury secrecy support the ruling below. Those policies would be seriously threatened by risks inherent in giving government lawyers an automatic right to use

grand jury materials in related civil litigation, i.e., the risk of disclosure of grand jury materials to others, the risk of dampening the willingness of grand jury witnesses to testify fully and candidly, and the risk of misusing the grand jury for civil investigative ends. Moreover, since these risks are essentially the same regardless of whether or not the government lawyers in the civil case participated in the prior grand jury proceeding, the court below was correct in rejecting the claimed right of automatic access by government lawyers who had participated in the prior grand jury proceeding, just as this Court in *Sells* rejected the claim of automatic access made by government lawyers who did not participate in the grand jury matter.

Finally, the appropriate vehicle for weighing the public interest in allowing government lawyers to have continued access to grand jury materials against the need for continued secrecy is a hearing on a request for a court order based upon a showing of particularized need. Such a hearing would address all of the concerns articulated by the government without abandoning consideration of the interest in continued grand jury secrecy.

None of the Government's contrary arguments is compelling. Thus, the argument that a disclosure order is not compelled by the plain meaning of the Rule is based on the erroneous assumption that prohibited disclosures under the ~~Rule do~~ not include use of refreshed or unrefreshed recollection of grand jury materials in civil litigation. The claim that the delay inherent in seeking such an order is so burdensome that the Court should relieve the Government from complying with this requirement of Rule 6(e) is invalid

on its face. It also ignores this Court's holding in *Sells* that the same considerations should govern disclosure to government movants as well as private ones. The argument that lower courts will inevitably err in applying the standard for issuance of disclosure orders overlooks the courts' experience with the standard and in any event is no justification for forgoing judicial responsibility to apply the legislative mandate. Finally, the claim that there is no function to be performed by hearings on requests for disclosure orders is demonstrably wrong.

ARGUMENT

Introduction

The Government opens its argument with a policy discussion that boils down to a contention that the public interest in protecting the secrecy of grand jury proceedings must give way in every case to an alleged greater public interest in permitting continued use of grand jury materials by lawyers representing the Government in a civil proceeding. (Pet. Br. 20.) The Government urges that a rule forbidding such continued use would require it to recreate the grand jury materials through the use of the Antitrust Civil Practice Act, 15 U.S.C. § 1311 ("ACPA"), or ordinary civil discovery, a prospect that it decries as unduly burdensome, expensive and time-consuming. (*Id.*) The flaw in this argument is threefold.

First, the Government's claims of delay and expense are exaggerated. Since a grand jury investigation is ordinarily much more expansive in scope than an ensuing related civil investigation, the Government will seldom have to duplicate all of the grand

jury materials. Only those materials relevant to the civil lawsuit need be obtained through civil process. Moreover, the Government argues elsewhere in its brief, when urging that the ACPA eliminates any incentive to abuse the grand jury process to generate evidence for a civil suit, that "conducting a grand jury investigation . . . involves considerably more effort and expense than civil discovery under the ACPA." (Pet. Br. 36.) The Government also insists that it merely wants its lawyers to have the opportunity to review grand jury materials and not to make them publicly available. If this is indeed all that the Government seeks, then it would be required in any event to use civil discovery to duplicate such of the grand jury materials as it wishes to offer in evidence, append to pleadings, or otherwise make public in the civil proceeding.

Second, this Court has repeatedly held that the delay and expense of alternative discovery methods does not by itself ordinarily constitute "particularized need" for disclosure of grand jury materials pursuant to court order. *Sells*, 463 U.S. at 431, 460 U.S. 557, 565-73 (1983); *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682-83 (1958); *Smith* v. *United States*, 423 U.S. 1303, 1304 (1975) (Douglas, J., in chambers). *A fortiori*, delay and expense alone will not justify a rule allowing government lawyers automatic access to grand jury materials for civil investigative purposes.

Third, the Government's argument concerning expense and delay is properly addressed to a court considering a motion for disclosure under Rule 6(e)(3)(C)(i). (*See* Part V, *infra*.)

The Government's introductory discussion tenders, apparently as its clinching policy argument, that the

ultimate question in this case is whether attorneys who conduct a criminal investigation must be disqualified from participating in a subsequent related civil lawsuit. (Pet. Br. 20-21.) It contends that disqualification would necessarily follow from acceptance of the Second Circuit's view that such attorneys cannot have free access to grand jury materials. The Government says that if the rule were to prohibit such attorneys from using their refreshed recollection of grand jury materials, then their unrefreshed recollection of the materials would also subject them to challenges. (*Id.*)

The Government is correct in its belief that "it would make no sense" under Rule 6(e) to treat a lawyer's refreshed knowledge of grand jury materials differently from his unrefreshed recollection of such materials. (Pet. Br. 27.) If an opportunity to review grand jury materials for use in civil litigation is disclosure violative of the letter and policy of Rule 6(e), then the opportunity to use unrefreshed recollection of matters occurring before the grand jury is equally a disclosure permitted only pursuant to a court order under 6(e)(3)(C)(i).

The Government is wrong, however, in asserting that the question is therefore one of disqualification. The Second Circuit held, in accordance with this Court's opinion in *Sells*, that continued access by government lawyers to grand jury materials for use in a civil case is not per se prohibited but may be permitted pursuant to a (C)(i) court order upon a showing of particularized need. (Pet. App. 17a.) This applies to all attorneys who conducted the prior grand jury investigation: they are not forever barred from the civil case but may be assigned to it pursuant to such

a court order based on a showing of particularized need.

I. THE SECOND CIRCUIT'S INTERPRETATION OF RULE 6(e) AS PROHIBITING THE CONTINUED USE OF GRAND JURY MATERIALS IN THE CIVIL PHASE OF A DISPUTE BY GOVERNMENT ATTORNEYS WHO PARTICIPATED IN THE CRIMINAL INVESTIGATION IS FULLY CONSISTENT WITH THE PLAIN MEANING OF THE RULE.

The Government assails the Second Circuit's holding as contravening what it asserts to be the "plain meaning" of the term "disclose" as used in Rule 6(e). In truth, however, it is the Government's interpretation of that term that does violence to the plain meaning of Rule 6(e).

The Government notes that the dictionary definition of "disclose" is "to open up[,] to expose to view[,] * * * [to] open up to general knowledge" (Webster's Third New International Dictionary 325 (1976 ed.)), and "to make known or public * * * something previously held close or secret" (Webster's New Collegiate Dictionary 325 (1975 ed.)). (Pet. Br. 24.) It then repeatedly makes the remarkable assertion that, when government attorneys rely on their unrefreshed recollection of grand jury materials or refer to those materials to refresh their recollection, and then participate in a subsequent civil suit making use of their refreshed or unrefreshed recollection, they do not "make known" formerly secret grand jury information. (Pet. Br. 24, 26.) The Government apparently contends either that the "plain meaning" of "disclose" encompasses only the act of physically transferring the grand jury materials from one to another (Pet. Br. 25, 26), or that a former grand jury lawyer

will never in any way disclose grand jury secrets in the subsequent civil case but will simply review the materials and then make no further use of them. (Pet. Br. 27.)

Both contentions are wrong. First, the proposition that one can "disclose" grand jury secrets within the meaning of Rule 6(e) only by physically showing or transferring grand jury materials to someone is inconsistent with the terms of the rule. Rule 6(e)(2) prohibits the disclosure of "matters occurring before the grand jury"; it is not limited to the physical transfer or display of grand jury transcripts or documents. One can obviously "disclose" or "make known" "matters occurring before the grand jury" by talking about them or by writing them down and revealing the writing to others as well as by showing the original embodiment of the grand jury secret to another.[3]

Second, to pretend that grand jury secrets will never be revealed in the civil suit by a government lawyer who has continued access to them simply ignores the realities of trial preparation and litigation. A grand jury lawyer involved in a subsequent civil investigation will not be referring to grand jury materials to satisfy any personal curiosity. He will be

---

[3] *See, e.g.*, In re Special February 1975 Grand Jury, 662 F.2d 1232, 1238 (7th Cir. 1981) (fact memorandum to file, summary of case and summary of testimony all subject to Rule 6(e)), *aff'd sub. nom.* United States v. Baggot, 463 U.S. 476 (1983); Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 869 (D.C. Cir. 1981) ("matters occurring before the grand jury" include "not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal . . . the substance of testimony . . ."); In re Grand Jury Investigation, 610 F.2d 202, 216-17 (5th Cir. 1980) (same).

referring to them for use in drafting pleadings, questioning witnesses and formulating trial strategy. Each time such a lawyer drafts a complaint paragraph setting forth facts or theories gleaned from grand jury materials, he "makes known" to all who read the complaint the grand jury secrets. Similarly, each time he formulates questions to witnesses based on facts in secret grand jury proceedings, or drafts an interrogatory based on such secrets, or formulates strategy with co-counsel based on knowledge gleaned from the grand jury materials, he "exposes to view" those previously secret facts.[4]

The weakness of its position on the meaning of "disclosure" is apparent in the Government's argument that grand jury attorneys, after gaining initial lawful access to grand jury materials, thereafter have a "right" to use the materials in civil litigation because such use "does not expand the scope of their initial lawful use" permitted under the plain language of the Rule. (Pet. Br. 27.) This argument is nothing more than a variation of the totally discredited position that Rule 6(e) permits government attorneys to have automatic access to grand jury materials for both criminal and civil investigative purposes. Rejection of this argument was the Court's point of departure in *Sells*. It held that government attorneys are initially allowed access to grand jury materials

---

[4] *Cf., e.g.*, United States v. McDaniel, 482 F.2d 305, 311-12 (8th Cir. 1973) (where federal prosecutor read immunized testimony of state grand jury witness before participating in federal criminal proceeding against witness, indictment must be dismissed since testimony "could not be wholly obliterated from the prosecutor's mind" and thus must be presumed to have been used in the preparation and trial of the case.)

"not for the general and multifarious purposes of the Department of Justice, but because both the grand jury's functions and their own *prosecutorial* duties require it." *Sells*, 463 U.S. at 429 (emphasis in original). The continued use of grand jury materials at issue in this case obviously "expand[s] the scope" of such initial, lawful prosecutorial use to include use in civil litigation.

II. THE LEGISLATIVE HISTORY OF RULE 6(e) SUPPORTS THE SECOND CIRCUIT'S DECISION.

This Court held in *Sells* that the legislative history of Rule 6(e) clearly indicated that disclosure of grand jury materials for use in civil litigation by attorneys who took no part in the criminal investigation should not be permitted without a court order. 463 U.S. at 440. That legislative history cannot be squared with the anomalous position now urged by the Government that grand jury prosecutors have an automatic right to use grand jury materials in preparing and litigating a subsequent civil action, whereas other government attorneys cannot use such materials without a court order.

Rule 6(e), as originally enacted, allowed government attorneys automatic access to grand jury materials only "inasmuch as they may be present in the grand jury room during the presentation of evidence." Advisory Committee Notes on Federal Rule of Criminal Procedure 6(e), 18 U.S.C. App., p. 1411. As this Court explained in *Sells*, the Advisory Committee Notes reflect Congress's intent to allow access only to attorneys actually working on the criminal matter, and only because the grand jury's functions and the prosecutor's duties require it. 463 U.S. at 429.

Obviously, once the grand jury investigation is closed, continued access to grand jury materials for use in civil litigation is not justified by the reasons that justify access for criminal prosecutors.

As this Court recognized in *Sells*, the legislative history of the 1977 amendment to Rule 6(e) indicates that there should be no opportunity for use of grand jury materials in a civil suit without a court order under subsection (C)(i) of Rule 6(e)(3). 463 U.S. at 440. This history fully supports a ruling that would allow the assignment of a grand jury lawyer to a subsequent civil case or the grand jury lawyer's continued access to grand jury documents pertinent to the civil case only pursuant to an order obtained upon a showing of particularized need.

The 1977 amendment to Rule 6(e) added the provision in Rule 6(e)(3)(A)(ii) allowing disclosure to nonlawyers consisting of "such government personnel . . . as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." The amendment, as originally proposed, was not limited to enforcement of the federal "criminal law". Thus, the House of Representatives, after hearings on the proposal, voted to disapprove it. 123 Cong. Rec. 11108-12 (1977). The House committee's report recommended disapproval specifically because

> "[i]t was feared that the proposed change would allow Government agency personnel to obtain grand jury information which they could later use in connection with an unrelated civil or criminal case. This would enable

> those agencies to circumvent statutes that specifically circumscribe the investigative procedure otherwise available to them." H.R. Rep. No. 95-195, 95th Cong., 1st Sess. 4 (1977) (footnote omitted).

The Senate Judiciary Committee altered the proposal by inserting the criminal-law use limitation, in order to "allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws . . .." S. Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977); *see also id.* at 1-2, 5-7.

The clear concern of Congress was the risk of use of grand jury materials in civil litigation without the protections afforded by the requirement of obtaining court authorization. As this Court recognized in *Sells*, this concern applies to the risk of such use by the Justice Department as well as by others. 463 U.S. at 438-40; *see Hearings on Proposed Amendments to the Federal Rules of Criminal Procedure before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 95th Cong., 1st Sess. 67 (1977) (statement of Acting Deputy Attorney General Richard Thornburgh). Moreover, no distinction was drawn in the legislative history between risk of use by attorneys who participated in the grand jury proceedings and risk of use by attorneys who had not. Rather, as this Court noted in *Sells*, "the key distinction was between disclosure for criminal use, as to which access should be automatic, and for civil use, as to which a court order should be required." 463 U.S. at 440.

The Government cites no legislative history affirmatively supporting its view that grand jury attorneys

should be allowed continued access to grand jury materials that are pertinent to civil litigation. Rather, it points to the *lack* of any legislative history indicating Congressional disapproval of what it asserts to be the Department of Justice's "longstanding practice" of allowing attorneys who participated in grand jury proceedings to review grand jury materials in considering and preparing a subsequent civil suit. (Pet. Br. 28-29.) It also asserts that this Court approved this "longstanding practice" in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), wherein the Court noted that in that case, "the Government [was] using the grand jury transcripts to prepare for trial [in a civil case]," 356 U.S. at 678. (Pet. Br. 28.) Neither of those arguments has merit.

To begin with, none of the advisory notes or legislative history that the Government cites indicates any Congressional awareness of a governmental "practice" of allowing continued use of grand jury materials in civil litigation by government attorneys. Thus, Congress's failure to indicate any disagreement with such practice is neither surprising nor significant.

Moreover, the argument that the Court in *Procter & Gamble* "approved" continued use of grand jury materials in a civil case by attorneys who have participated in the grand jury proceeding was expressly rejected by this Court in *Sells*.[5] The Court also rejected the Government's "standard practice" argument, because such " 'standard practice' was somewhat inconsistent with itself, and in many instances resulted in use of grand jury materials that clearly would now be considered illegal under Rule 6(e)." 463 U.S. at 440 n. 30.

[5] "The Government contends that the issue of Government access for civil use was settled in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958). We disagree . . . The passages from that decision so heavily relied on by the dissent . . . are simply the Court's recognition that civil use of properly created grand jury materials is not per se illegal. The Court did not address, however, the *conditions* under which such civil use by the Government could be permitted, since the issue in the case was only whether private parties could obtain access. In particular, no issue was presented in the case as to whether, having used the grand jury for strictly criminal purposes, the Government should have been permitted to use the grand jury's records for civil ends (*whether through the same attorneys or different ones* . . .) The Court's opinion did not discuss that aspect of the case at all." 463 U.S. at 434 n. 19 (last emphasis added).

III. THE POLICIES UNDERLYING THE RULE OF GRAND JURY SECRECY SUPPORT THE HOLDING BELOW.

This Court held in *Sells* that allowing access to grand jury materials in civil litigation by lawyers who took no part in the criminal investigation threatened inadvertent or illegal disclosure to others, threatened to chill the testimony of grand jury witnesses and risked manipulation of the grand jury for civil investigative ends. 463 U.S. at 432-35. All of these considerations apply as well to the use of refreshed or unrefreshed recollection of grand jury materials by lawyers who participated in the criminal investigation.

A. The Risk of Illegal or Inadvertent Disclosure

The Government argues that there is minimal risk of inadvertent or illegal disclosure to others because

there is no increase in the number of persons with access to grand jury materials. This argument makes the same erroneous assumption as the Government's plain meaning argument, *i.e.*, that the only type of disclosure prohibited by Rule 6(e) is the act of showing or transferring grand jury materials to others not authorized to receive them. But, as the discussion at pp. 13-14, 17, *supra*, makes clear, where government attorneys working on the civil phase of a dispute have continued access to secret grand jury information, the risk of disclosure to other attorneys working on the case, to witnesses, and to the public is essentially the same, whether or not the same government attorneys in the civil case previously participated in the grand jury proceeding.

Moreover, as the Second Circuit correctly held, continued use of grand jury materials by lawyers involved in the civil lawsuit carries with it the likelihood that paralegals and secretarial staff, including those who did not work on the grand jury proceeding, will also be exposed to the material. (Pet. App. 15a-16a.) This obviously increases the risk that illegal or inadvertent disclosure to others will occur. The Government's contention that this risk is no greater than that posed by support personnel working with an attorney on a criminal investigation ignores the possibility of disclosure by new support staff working with the materials and disregards the warning of this Court in *Sells* that *any* threat to the secrecy of grand jury proceedings must be prevented unless clearly authorized by law. 463 U.S. at 425.

B. The Chilling of Grand Jury Witness Testimony

The Second Circuit also correctly held that the continued use of grand jury materials in the civil phase

of a dispute clearly poses a risk of chilling the testimony of grand jury witnesses. (Pet. App. 16a.) The Government seeks to downplay this risk by pointing out that grand jury witnesses are already subject to having their testimony revealed under the provisions of the Jencks Act or pursuant to a court order under Rule 6(e)(3)(C)(i), and may have their testimony compelled under the provisions of the Antitrust Civil Practice Act. (Pet. Br. 33.) It also suggests that a prosecutor can rely on his recollection of their testimony in preparing a later civil suit. Therefore, the Government argues, a witness not "chilled" by these other potential uses of his testimony would not be deterred by the prospect of wholesale automatic use in a civil case by attorneys who worked on the criminal case. (*Id.*)

The Government's argument is wrong for several reasons. First, the attempt to equate routine use of grand jury materials in civil litigation with other limited uses authorized by law fails at the outset. The Jencks Act authorizes the disclosure of statements of government witnesses, including grand jury testimony, only if the witness is called by the United States to testify at trial, only to the criminal defendant, and only insofar as it relates to the subject matter of the witness's testimony at trial. 18 U.S.C. § 3500; *see, e.g., Palermo* v. *United States*, 360 U.S. 343, 349 (1959); *United States* v. *Minkin*, 504 F.2d 350, 356 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975). Similarly, a disclosure order under Rule 6(e) will issue only upon a showing that the material is needed to avoid injustice in another proceeding, that the need for disclosure is greater than the need for continued secrecy, and that the request for disclosure

applies only to materials so needed. *Sells*, 463 U.S. at 443. Obviously these types of uses are not equivalent to the wholesale, automatic use of grand jury materials in civil litigation by government lawyers who participated in the grand jury proceedings. They simply do not implicate this Court's clear concern in *Sells* that "[i]f a witness knows or fears that his testimony before the grand jury will be *routinely available for use in governmental civil litigation* . . . he may well be less willing to speak for fear that he will get himself into trouble in some other forum." 463 U.S. at 432 (emphasis added).

Second, revelation under the Jencks Act or pursuant to a Rule 6(e) order or compelled production pursuant to the ACPA is in each case clearly authorized by statute or rule and thus is permissible despite any chilling effect it may have on grand jury witnesses. The possibility that the witness will see his grand jury testimony made public for any of the suggested reasons does not argue for letting a government lawyer refer to it and use it for civil litigation as proposed by the Government, for "[i]n the absence of a clear indication in a statute or Rule," *any* threat to grand jury secrecy is to be forestalled. *Id.* at 425. In any event, the availability of the ACPA to compel testimony in a civil proceeding is not the same as the availability of the grand jury testimony itself.

C. The Threat to the Integrity of the Grand Jury

Although the Second Circuit found that the free use of grand jury materials proposed by the Government posed no threat to the integrity of the grand jury (Pet. App. 14a), we submit that it does. The Government is proposing wholesale, routine availability of grand jury documents in civil litigation by government attorneys who previously had access to those materials in the criminal proceeding. It defies reality to say that if grand jury materials are so freely available, the Government will have no incentive to use the grand jury to collect information useful in a later civil suit. This Court was concerned in *Sells* that, "[if] prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely." 463 U.S. at 432. The concern applies as well to prosecutors who know they can themselves make use of the materials. This is particularly true if the government's complaints of the burdensomeness of ACPA (Pet. Br. 20, 42) are to be taken at face value.

Moreover, the concern of the Court in *Sells* was "based less on the belief that grand jury misuse is in fact widespread than on our concern that, if and when it does occur, it would often be very difficult to detect and prove." *Id.* at 432. The Government's suggestion that the grand jury lawyer will be readily available to testify if a question of misuse arises (Pet. Br. 37) obviously does not answer this concern.

IV. A COURT ORDER UNDER RULE 6(e)(3)(C)(i) IS THE APPROPRIATE VEHICLE FOR BALANCING THE INTEREST OF GRAND JURY SECRECY AGAINST THE GOVERNMENT'S NEED FOR CONTINUING ACCESS TO GRAND JURY MATERIALS IN PARTICULAR CIVIL CASES.

All of the Government's concerns about any need for its civil lawyers to have access to grand jury

materials can be properly addressed in a hearing on a request for a court disclosure order under Rule 6(e)(3)(C)(i). The standard for granting such an order is "flexible" and "accommodates any relevant consideration peculiar to Government movants," as this Court explained in *Sells*:

> "The *Douglas Oil* [*Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979)] standard is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others . . . [T]he standard . . . accommodates any relevant consideration peculiar to Government movants, that weigh for or against disclosure in a given case. For example, a district court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public. Similarly, we are informed that it is the usual policy of the Justice Department not to seek civil use of grand jury materials until the criminal aspect of the matter is closed. *Cf. Douglas Oil*, *supra*, at 222-223. And 'under the particularized-need standard, the district court may weigh the public interest, if any, served by disclosure to a governmental body . . . .' [*Illinois* v.] *Abbott* [& Associates, Inc.], 460 U.S. [557], at 567-568 n.15 [(1983)]. On the other hand, for example, in weighing the need for disclosure, the court could take into account any alternative discovery tools available by statute or regulation to the agency seeking disclosure." 463 U.S. at 445.

None of the Government's arguments for dispensing with the requirement of a disclosure order is compelling. The Government first says such an order is not required by the plain meaning of Rule 6(e). (Pet. Br. 37, n. 32.) This argument assumes that the prohibited disclosure under the Rule does not include reference to and use of grand jury materials in civil litigation, which, as discussed at p. 13, *supra*, is simply wrong.

The Government next argues that the delay incident to seeking a court order is unduly burdensome. (Pet. Br. 37, n. 32.) But such delay is inherent in the requirement that an order be sought to limit inroads on grand jury secrecy and cannot provide a reason for eliminating the protection such an order affords. Moreover, private parties face the same delay as does the Government, and this Court in *Sells* expressly held that the same standard governing disclosure to private parties applies to the Government as well. 463 U.S. at 444. Thus, unless the Government is prepared to concede that the delay incident to requesting a court order should eliminate any requirement for private parties or the Government to seek such orders, its argument lacks force.

The Government also argues that "if this Court were to articulate an appropriate standard," lower courts might err in applying it. (Pet. Br. 37, n. 32.) But this Court has already articulated the appropriate standard in *Sells*, which is the same standard of particularized need long applicable to private litigants and which lower courts have had considerable expe-

rience applying.[6] In any event, that some courts may err in applying the standard is clearly not a reason for abandoning judicial responsibility to interpret and apply the legislative mandate.

Finally, the Government argues that there is no useful function served by a Rule 6(e)(3)(C)(i) hearing, as the question of continued use in a civil proceeding is a general question that this Court should answer. (Pet. Br. 37, n. 32.) This argument, if accepted, would reverse the main thrust of Rule 6(e), which mandates that continued use of grand jury materials in a civil proceeding is generally impermissible, and would substitute the erroneous concept that continued use by government lawyers is generally permissible. The function of a hearing on a request for court-ordered disclosure is the important one of "weighing carefully" reasons for disclosure, such as those advanced in this case by the Government, against the need for secrecy, "[a]nd if disclosure is ordered, . . . includ[ing] protective limitations on the use of the disclosed material," *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 223 (1979). That function cannot be performed by a general rule allowing automatic access.

CONCLUSION

The judgment of the court of appeals should be affirmed.

---

[6] *See, e.g.*, In re Disclosure of Testimony Before the Grand Jury, 580 F.2d 281, 286-88 (8th Cir. 1978); Illinois v. F.E. Moran, Inc., 740 F.2d 533, 540 (7th Cir. 1984); Allis-Chalmers Mfg. Co. v. City of Fort Pierce, 323 F.2d 233, 238-42 (5th Cir. 1963); Illinois v. Harper & Row Publishers, Inc., 50 F.R.D. 37, 40-42 (N.D. Ill. 1969).

Respectfully submitted,

J. RANDOLPH WILSON
WILLIAM H. ALLEN
CAROL FORTINE
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioner
Nabisco Brands, Inc.

DAVID A. DONOHOE
OWEN M. JOHNSON, JR.
PAUL B. HEWITT
Akin, Gump, Strauss, Hauer
& Feld
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Attorneys for Petitioner
Archer-Daniels-Midland Company